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No. 91-886

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BOB REVES, ROBERT H. GIBBS and FRANCES GRAHAM, As Representatives of a Class of Noteholders,
Petitioners,
vs.
ERNST & YOUNG,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the Eighth Circuit err when it held, in conflict with other courts of appeals, that §1962(c) of the RICO statute, which makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity," requires proof that the defendant managed or operated the enterprise?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Page

Page

Page

Page

Page

Page

Statutes, Rules and Regulations

Legislative Material

Page

Secondary Authorities

Page

INTEREST OF THE *AMICUS CURIAE*

The National Association of Securities and Commercial Law Attorneys (NASCAT) hereby files its *amicus curiae* brief in support of Petitioners. For the reasons set forth herein, NASCAT supports reversing the decision of the Eighth Circuit Court of Appeals in this case.[1]

NASCAT is an association of nearly 500 attorneys who litigate antitrust, commercial, consumer and securities fraud class action and derivative cases in federal and state courts throughout the country. NASCAT and its members are devoted to representing victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity in cases that have the potential for advancing the state of the law, educating the public, modifying corporate behavior and improving the access of victims to justice and adequate compensation for the wrongs that have been inflicted upon them.

NASCAT's members have litigated (and are presently litigating) numerous treble damage civil actions arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-1968.[2] NASCAT has found

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[1] The Eighth Circuit's decision is reported as *Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991) ("*Arthur Young*"), *cert. granted and denied*, __ U.S. __, 60 U.S.L.W. 7578 (1992). NASCAT has obtained consent to file this brief from both Petitioners and Respondent.

[2] For example, members of NASCAT serve as counsel for nearly 20,000 investors in now-bankrupt American Continental Corporation ("ACC"), controlled by convicted felon Charles H. Keating, Jr. ("Keating"), who used the premises of ACC's wholly-owned, federally-insured thrift, Lincoln Savings & Loan ("Lincoln Savings"), to peddle hundreds of millions of dollars of junk bonds to elderly victims which became worthless when ACC declared bankruptcy and federal regulators seized Lincoln Savings in April, 1989. Keating's fraudulent scheme caused the most catastrophic savings and loan failure in American history, estimated to cost the taxpayers over $2 *billion*. NASCAT's and Respondent's interests in this case and the *ACC/Lincoln Savings* case are intertwined because the victims' class action lawsuit, which is presently in trial in the District of Arizona, asserts civil RICO, federal securities fraud and state law (including Arizona RICO)

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civil RICO actions to be one of the few effective remedies that a wide range of the American people, from small businesses to the elderly, have to obtain adequate redress when they are cheated by fraudulent or criminal behavior which, unfortunately, runs rampant in today's society. To insure that the access to justice and adequate compensation which Congress expressly provided in RICO's civil remedy provisions, 18 U.S.C. §§1964-1965, based upon violations of RICO's proscriptions, 18 U.S.C. §1962, is neither narrowed nor foreclosed but, rather, is nurtured and interpreted in accordance with the statute's express remedial purpose, NASCAT believes that the decision of the court below should be reversed.

NASCAT submits that the Eighth Circuit's restrictive interpretation of the "conduct" element of §1962(c) not only misinterprets the statutory language and ignores RICO's Liberal Construction Clause and legislative history but will result in an unwarranted emasculation of the statute, which Congress expressly designed to combat organized criminal behavior and provide an additional yet essential remedy for victims of fraudulent schemes. Upholding the lower court's misguided interpretation and application of the statute in this case could result in certain professional wrongdoers'

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claims against professional co-conspirators — lawyers, accountants (including Respondent's predecessor firm, Arthur Young & Company), economists and investment bankers — who assisted Keating in operating his engine of greed and avarice. *See In re American Continental Corp./ Lincoln Savings & Loan Securities Litigation*, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,704 (D. Ariz. 1990). Following three days of testimony, Respondent settled investors' claims for a record payment of $63 million while ACC/Lincoln Savings outside counsel, Jones, Day, Reavis & Pogue, paid $24 million. *See* A. Cowan, *Big Law and Auditing Firms To Pay Millions in S. & L. Suit*, N.Y. Times, Mar. 31, 1992, at A1; A. Stevens, *Ernst & Young and Jones Day Law Firm To Pay $87 Million in Lincoln S & L Case*, Wall St. J., Mar. 31, 1992, at A3. As a result, the court's decision in the case at bar, in which Respondent seeks immunity for professionals from civil *and* criminal RICO liability, could have immediate and lasting impact.

(including Respondent's) undeserved immunity from RICO prosecutions and treble damage civil actions. No person or entity (including accountants, attorneys, or bankers) is immune from RICO's proscriptions, yet group immunity is undeniably sought by Respondent and its fellow professional *amici* in this case. Moreover, failure to reverse the decision of the court below would unduly hamper the Government's ability to rely on §1962(c) in criminal RICO prosecutions, where it has been effectively utilized in organized crime cases over the past 20 years.

ARGUMENT

A. RICO'S EXPRESS STATUTORY LANGUAGE, MANDATED LIBERAL CONSTRUCTION AND LEGISLATIVE HISTORY REQUIRES THIS COURT TO INTERPRET SECTION 1962(c) BROADLY TO EFFECTUATE THE STATUTE'S REMEDIAL PURPOSES

This civil RICO case focuses on the proper interpretation of the "conduct" element of §1962(c) of the statute.[3] Contrary to Respondent's assertion, §1962(c)'s purposeful disjunctive construction makes unlawful the direct *or* indirect conduct of *or* participation in the conduct of an enterprise's affairs by *any* person employed by *or* associated with the enterprise.[4] The broad statutory language deliberately employed by Congress in crafting RICO[5] and especially

[3] RICO makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. §1962(c).

[4] *See H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 231-32 (1989) ("RICO renders criminally and civilly liable 'any person' . . . who, being employed by or associated with . . . an enterprise, conducts or participates in the conduct of its affairs 'through a pattern of racketeering activity' "); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) ("A violation of §1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.") (footnote omitted).

§1962(c)[6] does not distinguish between so-called "insider" and "outsider" defendants[7] in criminal *or* civil cases; rather,

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[5] RICO, Chapter 96 of Title 18 of the U.S. Code, 18 U.S.C. §§1961-1968, was added by Title IX of the Organized Crime Control Act of 1970 ("OCCA"), Pub. L. 91-452, 84 Stat. 941. Section 904(a) of OCCA, 84 Stat. 947, directs that "[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes." As stated in *Russello v. United States*, 464 U.S. 16, 27 (1983), RICO is the "only substantive federal criminal statute that contains such a directive," and as elaborated in *Sedima*, a civil RICO case:

> This less restrictive reading [of RICO] is amply supported by our prior cases and the general principles surrounding this statute. RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language, *see United States v. Turkette*, 452 U.S. 576, 586-587 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, §904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

473 U.S. at 497-98. In *Sedima*, this Court also stated that "if Congress' liberal-construction mandate is to be applied anywhere, it is in §1964, where RICO's remedial purposes are most evident." *Id.* at 491 n.10. RICO's Liberal Construction Clause is used to interpret the statute in both civil *and* criminal cases, *see Tafflin v. Levitt*, 493 U.S. 455, 467 (1990); *Northwestern Bell*, 492 U.S. at 248-49; *United States v. Monsanto*, 491 U.S. 600, 609 (1989); *Russello*, 464 U.S. at 21; *United States v. Turkette*, 452 U.S. 576, 587, 593 (1981). Notwithstanding Respondent's urgings, it cannot be avoided here.

[6] The House and Senate Reports accompanying RICO expressly stated that §1962(c)'s prohibitions are without limitation or exception. *See* Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 159 (1969) (§1962(c) applies to *any* "conduct of the enterprise through the prohibited pattern"; "there is no limitation on the prohibition"); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 4033 (1970) (same). *See also Russello*, 464 U.S. at 21-22 (calling "participate" and other RICO definitions "concepts of breadth"); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984) ("conduct" and "participate" are "broad terms which would defy judicial confinement"), *aff'd on other grounds per curiam*, 473 U.S. 606 (1985).

[7] Persons or entities "employed by" the enterprise are often referred to as "insiders" while "outsiders" are most often held liable under §1962(c)'s

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any person "associated with" the enterprise who directly or indirectly participates in the "conduct" of its affairs through a pattern of racketeering activity has violated the statute.[8] The court below inexplicably ignored §1962(c)'s deliberately broad and disjunctive construction, as well as RICO's express legislative history, when it held that Respondent did not directly or indirectly conduct or participate in the conduct of the enterprise's affairs.[9]

(fn. continued)
"associated with" language, *see United States v. Garver*, 809 F.2d 1291, 1301 (7th Cir. 1987); however, professional assistors such as Respondent who are employed or retained to assist in a fraudulent scheme may face liability under either clause because of their necessarily intimate involvement with kingpins like Milken and Keating.

[8] *See Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc) ("[§]1962(c) provides that participation may be indirect as well as direct, and nothing . . . precludes liability on the part of outsiders. The crucial question is not whether a person is an insider or an outsider . . . ."), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2839 (1991); *Garver*, 809 F.2d at 1301 (quoting *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.), *cert.denied*, 439 U.S. 953 (1978)) (RICO applies to both insiders and outsiders — " 'those merely "associated with" an enterprise — who participate . . . in the enterprise's affairs . . .' ").

[9] This case is a class action arising out of the sale of securities (notes) issued by a cooperative. Summary judgment was granted by the district court as to the RICO claim against the outside auditor (Arthur Young) and was affirmed by the Eighth Circuit, which held that the auditor's involvement in the enterprise (the cooperative) "did not rise to the level required for a RICO violation." *Arthur Young*, 937 F.2d at 1324. The Eighth Circuit stated that participating in the conduct of the affairs of an enterprise in violation of §1962(c) "ordinarily will require some form of participation in [its] operation or management," and held that Respondent's performance of audits, meeting with the board of directors to explain the audits, and making presentations at annual meetings "in no way rise[s] to the level of participation in the management or operation of" the cooperative, even though "[i]n the course of this involvement it is clear that Arthur Young committed a number of reprehensible acts." *Id.* In so holding, the court ignored RICO's statutory language, mandated liberal construction and legislative history, as well as its previous interpretation of the "conduct" element in criminal RICO cases and its construction of the identical term found in another provision of OCCA, the federal gambling syndicate

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To find the meaning of "conduct," this Court must "begin, of course, with RICO's text, in which Congress followed a 'pattern [of] utilizing terms and concepts of breadth' "[10] and must " 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' "[11] If RICO's language is plain, it controls;[12] if its language, syntax, or context is ambiguous,[13] the construction that

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statute, 18 U.S.C. §1955. Thus, the Eighth Circuit not only reached the wrong result, but its method of analysis was seriously flawed.

10 *Northwestern Bell*, 492 U.S. at 237 (quoting *Russello*, 464 U.S. at 21).

11 *Id.* at 238 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

12 *Id.* at 249; *see also Monsanto*, 491 U.S. at 606; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987); *Russello*, 464 U.S. at 21, 29; *Turkette*, 452 U.S. at 587 n.10.

13 In *Northwestern Bell*, where this Court reversed the Eighth Circuit's restrictive interpretation of "pattern of racketeering activity," Justice Brennan began the Court's analysis by construing RICO's statutory text, 492 U.S. at 237-39, relying on a dictionary definition of "pattern" to find its "normal usage," *id.* at 238 ("A 'pattern' is an 'arrangement or order of things or activities.' ") (quoting 11 *Oxford English Dictionary* 357 (2d ed. 1989)). In this case, the court below cited with favor the District of Columbia Circuit's earlier decision in *Yellow Bus*, which had also adopted a restrictive interpretation of "conduct" and offered the following linguistic analysis:

> "Conduct" is synonymous with "management" or "direction." Webster's Third New International Dictionary 473 (1961). The "conduct of the [enterprise's] affairs" thus connotes more than just some relationship to the enterprise's activity; the phrase refers to the guidance, management, direction or other exercise of control over the course of the enterprise's activities. In order to participate in the conduct of an enterprise's affairs, then, a person must participate, to some extent, in "running the show."

Yellow Bus, 913 F.2d at 954; *see Arthur Young*, 937 F.2d at 1324. But these courts' purported "plain language" analysis is far too restrictive because it is generally recognized that persons who take part in carrying out the activities of an enterprise *without* managing or directing its goals still "conduct" its activities. Thus, the definition of "conduct" found in 3 *Oxford English Dictionary* 691 (2d ed. 1989), the same dictionary utilized by this Court in *Northwestern Bell*, 492 U.S. at 238, includes the meaning

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would "effectuate its remedial purposes" by "providing enhanced sanctions and new remedies" must be adopted,[14] and for more specific guidance, this Court "must look past the [statutory] text to RICO's legislative history, as we have done in prior cases construing the Act."[15] Finally, as the court below pointedly ignored in this case, "conduct" must be read in the same fashion, whether civil[16] *or* criminal RICO is involved.[17] When these rules of construction are

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"[t]o direct, manage, carry on (a transaction, process, business, institution, legal case, etc.)," but pointedly adds: "The notion of direction or leadership is often obscured or lost; *e.g.*, an investigation is *conducted* by all those who take part in it." To the same effect is *Webster's Dictionary of Synonyms* 184 (1942) (emphasis added), which states that "[c]onduct may imply the act of an agent who is both the leader and the person responsible for the acts and achievements of a group having a common end or goal . . ., *but often the idea of leadership is lost or obscured, and the stress is placed on a carrying on by all or by many of the participants.*" Giving RICO's terms their "ordinary meaning," *Russello*, 464 U.S. at 21, the term "conduct" does not include these misguided courts' limitation that a person must participate in "running the show." Indeed, imposing a "management" or "significant control" limitation on the term "conduct" violates this Court's rule of RICO construction because it reads words into the statute that "appear[] nowhere in the language or legislative history." *Id.* at 240-41 (rejecting Eighth Circuit's "multiple scheme" limitation on "pattern" requirement because of lack of support in the statute or legislative history).

14 84 Stat. at 947; *see also Tafflin*, 493 U.S. at 466-67; *Monsanto*, 491 U.S. at 609; *Sedima*, 473 U.S. at 497-98; *Russello*, 464 U.S. at 27; *Turkette*, 452 U.S. at 587-88, 593.

15 *Northwestern Bell*, 492 U.S. at 229 (citing *Sedima*, 473 U.S. at 486-90; *Russello*, 464 U.S. at 26-29; and *Turkette*, 452 U.S. at 586-87).

16 Violations of RICO may be enforced by private treble damage suits brought under §1964(c), which provides that "[a]ny person injured in his business or property by reason of" a violation of §1962 may sue. 18 U.S.C. §1964(c). Thus, the statute brings to bear "the pressure of 'private attorneys general' on a serious national problem for which private prosecutorial resources are deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987); *see also Holmes v. SIPC*, __U.S. __, 1992 U.S. LEXIS 1947, at *44 (Mar. 24, 1992) (O'Connor, J., and White and Scalia, JJ., concurring in part).

followed, the untenability of the Eighth Circuit's decision becomes clear.

B. THE STANDARD ADOPTED BY THE COURT BELOW IS CONTRARY TO THAT FOLLOWED IN OTHER CIRCUITS AND CONFLICTS WITH RICO'S STATED PURPOSE TO PROTECT LEGITIMATE BUSINESS AGAINST INFILTRATION AT ALL LEVELS

In considering the meaning of "conduct," most circuit courts have properly adopted varying formulations of the same general approach: they require *some* relationship between the affairs of the enterprise and a defendant's predicate acts of racketeering, but recognize that a mere coincidental or tangential connection between a person, a legitimate enterprise, and the racketeering activity is not sufficient. Yet, most courts recognize that "conduct" must be interpreted and applied in the broadest possible manner to insure that the statute's express purpose to combat[18] organ-

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[17] *Shearson*, 482 U.S. at 239; *Sedima*, 473 U.S. at 489; *cf. Northern Sec. Co. v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting) ("The words [used in a statute] cannot be read one way in a suit which is to end in a fine and imprisonment and another way in one which seeks an injunction.").

[18] Congress enacted RICO as Title IX of OCCA because it found that 18th and 19th Century jurisprudence was ineffective to combat white-collar crime and fraudulent behavior. OCCA's Statement of Findings recognized that organized crime "is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, *fraud*, and corruption," that such activities "weaken the stability of the Nation's economic system, *harm innocent investors and competing organizations*, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens" and that organized crime "continues to grow" because "the sanctions and remedies available to the Government are necessarily limited in scope and impact." In light of these findings, it was Congress' declared purpose "to seek the eradication of organized crime" by "providing *enhanced sanctions and new remedies* to deal with" its unlawful activities. 84 Stat. 922-23 (emphasis added); *see also Turkette*, 452 U.S. at 588-89

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ized crime,[19] fraud and so-called "white-collar" crime[20] will not be frustrated.[21]

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(quoting Statement of Findings).

[19] RICO's legislative history "clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello*, 464 U.S. at 26. Although the major purpose of Title IX was "to address the infiltration of legitimate business by organized crime," *Turkette*, 452 U.S. at 591, RICO was *not* limited to the prohibition of infiltration of legitimate organizations. *Id.* at 590. Nor does RICO apply only to organized crime in the classic "mobster" sense. *Sedima*, 473 U.S. at 495 ("not just mobsters"). Just three years ago, this Court rejected a full-court press from various *amici* aligned with the accounting profession, finding that their arguments for reading an organized crime limitation into RICO's "pattern" element "finds no support in the Act's text, and is at odds with the tenor of its legislative history." *Northwestern Bell*, 492 U.S. at 244. Rather, §1961(1) of RICO, with its purposefully broad definition of "racketeering activity," acknowledges the "breakdown of the traditional conception of organized crime, and responds to a new situation in which persons engaged in long-term criminal activity often operate *wholly* within legitimate enterprises." *Id.* at 248 (emphasis in original). Congress drafted the statute "broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *Id.* at 248-49.

[20] The Chief Justice has stated that "[w]hite collar crime is 'the most serious and all-pervasive crime problem in America today.' " *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988) (quoting Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 Am. Crim. L. Rev. 287, 288 (1980)). The Chief Justice added, "[a]lthough this statement was made [by Rep. Conyers] in 1980, there is no reason to think the problem has diminished in the meantime." *Id.* While RICO may have been primarily aimed at "organized crime," its use "as a weapon against 'white collar crime' . . . is not contrary to the intent of Congress but is in fact one of the 'benefits' Congress saw the Act as providing." *Papai v. Cremosnik*, 635 F. Supp. 1402, 1411 (N.D. Ill. 1986) (citation omitted). *See also Furman v. Cirrito*, 741 F.2d 524, 529 (2d Cir. 1984), *vacated in part on other grounds sub nom., Joel v. Cirrito*, 473 U.S. 922 (1985).

[21] Congress would hardly have made it unlawful to "conduct" or "participate directly *or* indirectly in the conduct of" the enterprise's affairs, 18 U.S.C. §1962(c) (emphasis added), if it had wanted to impose a narrow

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The narrow standard adopted by the court below, however, directly contravenes RICO's stated purpose to protect legitimate business against infiltration at all levels[22] and it stands in marked conflict with the correct standard adopted in other circuits — including the Eighth Circuit — in civil *and* criminal RICO cases. Indeed, NASCAT submits that affirming the decision in this case would severely limit RICO's effectiveness as a prosecutorial tool in the Government's ongoing (and increasingly effective) war against organized crime, and would seriously endanger RICO's use as a weapon to combat consumer and investment fraud.

Reference to numerous cases demonstrates §1962(c)'s utility in such essential criminal and civil prosecutions. For

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rule reaching only those who had obtained some significant level of control over the management or operation of the enterprise. Indeed, Congress is quite familiar with language that restricts a statute's reach to the leaders or managers of an enterprise. *See* 21 U.S.C. §848(b) (prescribing penalties for "[a]ny person who engages in a continuing criminal enterprise . . . if — (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders"); *see Garrett v. United States*, 471 U.S. 773, 781 (1985) (noting that §848 contains "a carefully crafted prohibition aimed at a special problem. This language is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers."). If Congress had intended to limit the class of persons or entities which could be found to directly or indirectly "conduct" the affairs of an enterprise, narrowing the definition of the word in question was all it took to achieve that objective. *See Turkette*, 452 U.S. at 581 (discussing statutory definition of "enterprise" and observing that Congress could have "narrowed the sweep of the definition by inserting a single word").

22 RICO's foremost purpose was to eliminate the "infiltration of organized crime and racketeering into legitimate organizations," S. Rep. No. 617, 91st Cong., 1st Sess. at 76. Such "infiltration" can take place gradually, and perniciously, long before it reaches the corporate boardroom or management suite. Accordingly, because "the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise," *United States v. Elliott*, 571 F.2d at 903, a "conduct" test limited to those who exercise significant control over the enterprise, manage it, or direct its activities cannot be reconciled with RICO's express objectives.

example, in *United States v. Scotto*,[23] which involved the receipt of illegal kickbacks by Anthony Scotto, the president of Local 1814 of the International Longshoremen's Association ("ILA"), the RICO enterprise, and Anthony Anastasio, the Local's executive vice president, the Second Circuit rejected defendants' argument on appeal that the trial court erred in refusing to instruct the jury that it must find that their predicate acts "concerned or related to the operation or management of the enterprise" and " '[a]ffected [its] affairs . . . in its essential functions.' "[24] In a landmark decision, the Second Circuit fashioned RICO's "conduct" test in the broadest possible terms:

> We think that one conducts the affairs of an enterprise through a pattern of racketeering activity when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, *or* (2) the predicate offenses are related to the activities of that enterprise. Simply committing predicate acts which are unrelated to the enterprise or one's position within it would be insufficient.[25]

23 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

24 *Id.* at 54 & n.3.

25 *Id.* at 54 (emphasis added). The *Scotto* court further clarified and emphasized the broadness of the test adopted:

> "Section 1962(c) nowhere requires proof regarding the advancement of the union's affairs by the defendant's activities, or proof that the union itself is corrupt, or proof that the union authorized the defendant to do whatever acts form the basis for the charge. It requires only that the government establish that the defendant's acts were committed in the conduct of the union's affairs."

641 F.2d at 54 (quoting *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978)). The Second Circuit has consistently followed *Scotto* in both criminal RICO, *see, e.g., United States v. Simmons*, 923 F.2d 934, 951 (2d Cir.) (collecting cases), *cert. denied*, __ U.S. __, 111 S. Ct. 2018 (1991);
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The Second Circuit's formulation of the "conduct" element[26] has been followed in the Third Circuit[27] and Ninth Circuit,[28] and with certain modifications it is generally

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United States v. Robilotto, 828 F.2d 940, 947-48 (2d Cir. 1987) (personal loans received by a union official because of his status were sufficiently related to the enterprise), *cert. denied*, 484 U.S. 1011 (1988); *United States v. LeRoy*, 687 F.2d 610, 617 (2d Cir. 1982) (illegal kickbacks received by union official because of his status were sufficiently related to the enterprise), *cert. denied*, 459 U.S. 1174 (1983), and civil RICO cases, *see, e.g., Farberware, Inc. v. Groben*, 764 F. Supp. 296, 307 (S.D.N.Y. 1991).

[26] In cases involving accountants and other professional defendants, however, certain district courts have improperly adopted a more stringent standard and exonerated such wrongdoers from RICO liability, often without citing, much less distinguishing, *Scotto*, and ignoring §1962(c)'s express language and legislative history. *See, e.g., Morin v. Trupin*, 747 F. Supp. 1051, 1066 (S.D.N.Y. 1990) (requiring plaintiff to replead and demonstrate "a factual basis for regarding the relationship between particular defendants (such as the appraisers, accountants, and lawyers) and the enterprise to be different than the typical contractual relationship between client and professional"). Given these cases' failure to adhere to the *Scotto* standard, Respondent's reliance upon them is misplaced. *See National Union Fire Ins. Co. v. Califinvest*, No. 90 Civ. 2476 (LLS), 1992 U.S. Dist. LEXIS 1956, at *22-23 (S.D.N.Y. Feb. 14, 1992).

[27] In *United States v. Provenzano*, 688 F.2d 194 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982), which affirmed a union official's conviction for accepting bribes in exchange for allowing violations of the collective bargaining unit, the RICO enterprise was the union local and the Third Circuit stated that "[t]he fact that the union was harmed rather than benefitted does not remove the conduct from RICO's ambit. . . . It is only when the predicate acts are unrelated to the enterprise or the actor's association with it that the nexus element is missing, and consequently there is no RICO violation." 688 F.2d at 200; *see also United States v. Zauber*, 857 F.2d 137, 150 (3d Cir. 1988) (RICO conspiracy conviction for kickback scheme in connection with pension fund loan affirmed where enterprise was recipient of the loans; making a loan to the corporation constitutes participating in the conduct of its affairs), *cert. denied*, 489 U.S. 1066 (1989); *United States v. Palmeri*, 630 F.2d 192, 199 n.3 (3d Cir. 1980) ("If two or more violations of §1954 are established, the defendant becomes subject to §1962(c), which requires that these two 'acts of racketeering' be related to the conduct of the enterprise.") (citation omitted), *cert. denied*, 450 U.S. 967 (1981).

[28] *See, e.g., United States v. Yarbrough*, 852 F.2d 1522, 1544 (9th Cir.)
(continued)

followed in the Fifth, Sixth and Seventh Circuits;[29] the state of the law in other circuits, however, is more confusing,

(fn. continued)
(affirming RICO conviction for participation in right wing supremacy group and stating that "[t]he Ninth Circuit has adopted the *Scotto* test," *i.e.*, it is enough that the predicate acts have some relationship to the enterprise), *cert. denied*, 488 U.S. 866 (1988); *Sun Savs. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 195 (9th Cir. 1987) (thrift institution alleged requisite nexus between its former president's racketeering activity and its affairs: "When he committed the alleged predicate acts of mail fraud, Dierdorff acted in his capacity as Sun's president. The acts of mail fraud were all related to the activities of Sun. Therefore, the complaint adequately alleges that Dierdorff conducted or participated in the conduct of Sun's affairs through a pattern of racketeering activity."); *see also Blake v. Dierdorff*, 856 F.2d 1365, 1372 (9th Cir. 1988).

[29] The Fifth Circuit originally adopted the *Scotto* approach, stating that §1962(c) merely required some "*relation* between the predicate offenses and the affairs of the enterprise." *United States v. Welch*, 656 F.2d 1039, 1061 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). In *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984), however, the court slightly modified the *Scotto* test, stating that:

> A defendant does not "conduct" or "participate in the conduct" of a lawful enterprise's affairs, unless (1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts; *and* (3) the predicate acts had some effect on the lawful enterprise.

706 F.2d at 1332-33 (emphasis added). The Fifth Circuit noted that its test cannot be met where a defendant simply "works for a legitimate enterprise and commits racketeering acts while on he business premises"; nor does "a defendant's mere association with a lawful enterprise whose affairs are conducted through a pattern of racketeering activity in which he is not personally engaged" violate RICO. *Id.* at 1332. The *Cauble* court stated that establishing an "effect" on the enterprise is not a stringent requirement; it can be satisfied, for example, by the defendant's depositing of funds in the enterprise's bank accounts, *id.* at 1332 n.24, and the court there affirmed a §1962(c) conviction where the defendant used assets and capital of his partnership — the RICO enterprise — to aid and abet drug smuggling activities. *Id.* at 1341.

In addition to the Sixth Circuit, *see United States v. Qaoud*, 777 F.2d 1105, 1115 (6th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986), *Cauble* has been followed in the Seventh Circuit, *see Overnite Transp. Co. v. Truck Drivers, Etc. Local No. 705*, 904 F.2d 391, 393-94 (7th Cir. 1990); *United*
(continued)

including the inexplicably inconsistent standard followed in the Eighth Circuit.[30]

(fn. continued)
States v. Pieper, 854 F.2d 1020, 1026 (7th Cir. 1988), and *United States v. Horak*, 833 F.2d 1235, 1239 (7th Cir. 1987), and in criminal RICO cases that court has always interpreted "conduct" broadly.

[30] In *Bennett v. Berg*, 685 F.2d 1053 (8th Cir.), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983), over 2,500 present and former residents of a retirement community brought a civil RICO action alleging that it had been subject to financial mismanagement and self-dealing such that they were in danger of losing "life-care" which they were promised and naming as defendants the project's mortgage lender (Prudential), accountants (SG&M) and attorneys. Affirming in part and reversing in part the district court's dismissal of the RICO claims, a panel of the Eighth Circuit rejected certain defendants' contention that they did not fall within §1962(c)'s proscriptions, stating that "[t]hese defendants were the mortgage lender and accountant to the Village. They were 'associated with' an enterprise." 685 F.2d at 1063 n.16. Sitting *en banc*, the Eighth Circuit expressed concern that plaintiffs' complaint "may be deficient in failing to allege adequately the requisite *degree* of participation in or conduct of the affairs of an enterprise on the part of each named defendant," 710 F.2d at 1364 (emphasis in original), and suggested in dictum:

> Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.

Id. On remand, however, Judge Roberts denied Prudential's and SG&M's motion to dismiss and held that the amended complaint sufficiently alleged their participation in the enterprise:

> I do not believe the words "conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs" can reasonably be limited to the sort of "hands-on-management" of daily activities which Prudential and SG&M suggest. I find no case authority supporting such a proposition; and to require that degree of involvement would both seem counter to the broad Congressional directive that "[t]he provisions of RICO shall be liberally construed to effectuate its remedial purposes," and incompatible with the express language of the statute, which provides that such conduct or participation in the affairs of the enterprise may be accomplished "directly *or* indirectly."

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Courts have almost uniformly reasoned that criminal (or fraudulent) activity far below the level of senior management can yield significant profits to wrongdoers and thwart the attainment of the enterprise's legitimate goals. Thus, "outsiders" who assist an enterprise to commit crimes, use its resources for criminal purposes, or influence its actions surely "participate . . . in the conduct of its affairs" through the prohibited pattern in violation of §1962(c), even though not significantly controlling its overall goals[31] and in affirming RICO convictions the courts have consistently (and correctly) construed the statute to reach that sort of misconduct. For example, in *United States v. Yonan*, 800 F.2d 164 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987), the Seventh Circuit held that a criminal defense attorney who attempted to bribe a prosecutor to influence the disposition

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Bennett v. Berg, Civil Action No. 80-0381-CV-W, 1984 Westlaw 2756 (W.D. Mo. June 21, 1984) (quoting Pub. L. 91-452, §904(a), 84 Stat. 947; other citations omitted). In this case, the Eighth Circuit improperly relied upon dictum from its *en banc* opinion in *Bennett*, 710 F.2d at 1364, and ignored the district court's subsequent (and proper) interpretation of that ruling. *See Arthur Young*, 937 F.2d at 1324.

Moreover, the court below ignored *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), where the Eighth Circuit did *not* cite its earlier decision in *Bennett*, 710 F.2d at 1364; instead, it endorsed the Fifth Circuit's *Cauble* standard and affirmed the conviction of the leader of a white supremacy group over the challenge that one of the arsons proved as part of the pattern of racketeering activity did not involve conduct of the affairs of that group. 793 F.2d at 950. The Eighth Circuit stated that "[t]he government did not have to prove that Ellison's racketeering activity benefitted the enterprise, but only that the predicate acts *affected* the enterprise." *Id.* (emphasis in original) (citing *Cauble*, 706 F.2d at 1333 n.24.

[31] *See United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973) ("The perversion of legitimate business may take many forms. The goals of the enterprise may themselves be subverted. Or the legitimate goals may be continued as a front for unrelated criminal activity. Or the criminal activity may be pursued by some persons in direct conflict with the legitimate goals, pursued by others. Or the criminal activity may, indeed, be utilized to fulfill otherwise legitimate goals.")

of cases participated in the "conduct" of the affairs of the State's Attorney's Office:

> [T]here is no statutory requirement that such persons have contact with policymakers or heads of enterprises before they can be said to be associated with it. In the absence of a statutory definition of "association," the cases have adopted a common sense reading of the term that focuses on the business of the enterprise and the relationship of the defendant to that business. The cases make clear that the defendant need not have a stake in the enterprise's "goals," but can associate with the enterprise by conducting business with it, even if in doing so the defendant is *subverting* the enterprise's goals.[32]

Criminal RICO cases unanimously support this mandated liberal interpretation of §1962(c)[33] and, as noted above,

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[32] 800 F.2d at 167 (emphasis in original). As the Seventh Circuit applied its test to the facts of the case before it:

> Here, the defendant is clearly alleged to have a business relationship with the enterprise. The relevant business of the Cook County State's Attorney's Office is to prosecute and otherwise dispose of criminal cases; Yonan's business as an attorney was to negotiate with, oppose, or otherwise deal with that office in representing criminal defendants. This alleged relationship is sufficient for the court to find that Yonan was associated with the State's Attorney's Office for purposes of [§]1962(c).

800 F.2d at 168; *accord United States v. Mokol*, No. 90-2681, 1992 U.S. App. LEXIS 4728 (7th Cir. Mar. 18, 1992) (chief deputy sheriff who accepted bribes in exchange for protecting illegal video poker operation was "associated with" amusement company/RICO enterprise).

[33] *See, e.g., United States v. Kaplan*, 886 F.2d 536, 540-41 (2d Cir. 1989) (bribery of Parking Violations Bureau officials in return for contracts constituted "conduct" of bureau's affairs), *cert. denied*, 493 U.S. 1076 (1990); *United States v. Roth*, 860 F.2d 1382, 1390 (7th Cir. 1988) (lawyer who bribed Cook County Circuit Court judges participated in the conduct of the court's affairs), *cert. denied*, 490 U.S. 1080 (1989); *Horak*, 833 F.2d at 1239 (employee of corporate subsidiary participated in the conduct of the

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there is no reasoned basis why RICO should be read or applied differently in its civil context; thus similar principles have been uniformly applied in treble damage actions arising under §1964(c).[34] In its seminal civil RICO decision in *Schacht v. Brown*,[35] the Seventh Circuit posited the applicable rule in the following broad terms:

> "The nature of racketeering connections to an otherwise legitimate business suggests that elements outside a company may assist in obtaining

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(fn. continued)
parent company's affairs by fraudulently procuring contracts for the subsidiary which financially benefitted the parent company: " 'conduct' in [§]1962(c) does not mean 'control' or 'manage,' and, in any event, [§]1962(c) also proscribes 'participat[ion], directly or indirectly, in the conduct' of the affairs of the enterprise"); *United States v. De Peri*, 778 F.2d 963, 983 (3d Cir. 1985) (§1962(c) "draws no distinction between the foot soldier and the general"), *cert. denied*, 475 U.S. 1110 (1986); *United States v. Watchmaker*, 761 F.2d 1459, 1476 (11th Cir. 1985) (RICO conviction affirmed where defendant's only involvement in the enterprise — a motorcycle club engaged in prostitution and drug distribution — was a single incident in which he shot three people; even those persons peripherally involved in the enterprise may be held liable because "the RICO statute was not designed to apply only to the 'kingpins' of criminal enterprises"), *cert. denied*, 474 U.S. 1100 (1986); *United States v. Janotti*, 729 F.2d 213, 226-27 (3d Cir.) (city councilman participated in the conduct of a law firm's affairs by accepting bribe to facilitate approval of a transaction from which the law firm stood to benefit by representing the bribe payer), *cert. denied*, 469 U.S. 880 (1984); *United States v. Bright*, 630 F.2d 804, 830-31 (5th Cir. 1980) (bonding company paying kickbacks to sheriff's office in return for business is sufficiently "associated with" that office).

[34] *See, e.g., Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1269 (3d Cir. 1987) ("A party is not shielded from RICO liability merely because he was not one of the creators or prime movers of the enterprise. Participation in the enterprise, if substantial, as Jerry Turco's participation could be found to be, is enough to establish liability, regardless of whether the timing of such substantial participation postdates the commencement of the enterprise. Both the captains and the lately enlisted foot soldiers in the enterprise are liable for the damage caused by their predicate acts.") (citation omitted).

[35] 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

> the company's illegal goals. Thus, '[t]he substantive provisions of the RICO statute apply to insiders *and outsiders* — those merely "associated with" an enterprise — who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity. Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise.' "[36]

In *Schacht*, the Director of Insurance of the State of Illinois (Director) in its role as statutory liquidator of an insolvent insurer (Reserve), brought a civil RICO action against the officers, directors and parent corporation (ARC) who allegedly continued Reserve in business past the point of insolvency and looted it of its most profitable and least risky business by entering into long-term contracts with other insurers. The Director also sued three accounting firms (Coopers & Lybrand, Alexander Grant & Company and Arthur Andersen & Company), alleging that they knew of Reserve's insolvency and of the further impairing effect of Reserve's continued operations but that, despite this knowledge, each of them prepared unqualified opinion letters as to ARC's consolidated financial statements in 1974, 1975, 1976 and 1977.[37]

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[36] 711 F.2d at 1360 (emphasis in original) (quoting *United States v. Starnes*, 644 F.2d 673, 679 (7th Cir. 1981), and *Elliott*, 571 F.2d at 903); *see also United States v. Tille*, 729 F.2d 615, 620 (9th Cir.) ("Proof of defendant's association with the illegal activities of the enterprise is all that is required. Associated outsiders who participate in a racketeering enterprise's affairs fall within RICO's strictures.") (citations omitted), *cert. denied*, 469 U.S. 845 (1984).

[37] 711 F.2d at 1345. In essence, the Director alleged that the accounting firm defendants joined with ARC and Reserve's officers and directors in a "multifaceted, fraudulent scheme" which kept Reserve operating long past insolvency and in a manner which resulted in enormous loans to the latter company. *Id.* at 1345-46.

Affirming the denial of defendants' motions to dismiss, the Seventh Circuit specifically rejected their argument that §1962(c) requires that they must be an "insider" or "manager" of the damage-causing RICO enterprise in order to suffer liability. Stating that "[w]e do not believe that the language and purpose of §1962(c) supports such an interpretation," and noting that "[o]ther courts . . . have had little trouble in finding that defendants who are not managers or employees in the colloquial sense are nevertheless reached by §1962(c),"[38] the *Schacht* court concluded that the defendant insurance companies, "who allegedly entered into long-term contracts with ARC," and the defendant auditors, "who allegedly aided the managerial defendants in operating ARC through systematic fraud" are sufficiently "associated with" or "employed by" ARC "within the meaning of" §1962(c).[39]

Thus, the rule adopted by the court below conflicts with better-reasoned civil *and* criminal RICO cases and, should it be allowed to stand, will undoubtedly limit RICO's utility as a public and private prosecutorial tool in organized crime and fraud cases. As demonstrated below, the Eighth Circuit ignored this Court's previously established standard to analyze RICO's statutory language, including the meaning of "conduct," as well as its correct (liberal) interpretation of the same word in 18 U.S.C. §1955.

C. REFERENCE TO OTHER PROVISIONS OF OCCA DEMONSTRATES THAT THE APPLICABLE STANDARD IS WHETHER DEFENDANTS, PROFESSIONAL OR OTHERWISE, PERFORMED ACTS THAT ARE "HELPFUL" OR "NECESSARY" TO THE RICO ENTERPRISE

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[38] *Id.* at 1360. The Seventh Circuit cited numerous criminal and civil RICO cases from the Third, Fifth, Sixth, Seventh and Eighth Circuits in support of this statement. *Id.*

[39] 711 F.2d at 1360.

In construing §1962(c), the Eighth Circuit specifically rejected the standard stated by the Eleventh Circuit in *Bank of America Nat'l Trust & Savings Ass'n v. Touche Ross & Co.*,[40] where the defendant accounting firm allegedly prepared false audited financial statements which were submitted to five banks (including Bank of America) which extended credit in reliance upon those statements. The *Bank of America* court reversed the dismissal of a civil RICO complaint, rejecting the contention advanced by Touche and a number of its partners (who had been named as defendants in their individual capacity) that §1962(c) required allegations and proof of their participation in the operation or management of the enterprise:

> Defendants argue that Congress intended to limit the reach of a civil RICO action by imposing a "conduct" requirement, *i.e.*, that defendant conducted or participated in the conduct of a RICO enterprise in a significant manner. This argument ignores the "directly or indirectly" language of §1962(c).
>
> The banks have alleged that defendants assisted in the preparation and dissemination of false financial statements. These financial statements were helpful to International Horizons because they allegedly induced the banks to lend money to the enterprise. The word "conduct" in §1962(c) simply means the performance of activities necessary or helpful to the operation of the enterprise.[41]

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[40] 782 F.2d 966 (11th Cir. 1986). *See Arthur Young*, 937 F.2d at 1324 (refusing to follow *Bank of America* standard).

[41] *Id.* at 970 (citation omitted).

As *Bank of America* noted, the "necessary or helpful" standard it adopted[42] was originally stated by the Fifth Circuit in *United States v. Martino*,[43] a criminal RICO prosecution involving an association-in-fact enterprise formed for the purpose of purchasing properties and committing arson fraud. The court rejected the contention that §1962(c) applies "only to those who manage the enterprise, *i.e.*, the top coterie,"[44] explaining that "[t]he word 'conduct' is neither illusive nor mysterious, nor is its use unique to RICO."[45] Indeed, *Martino* held that the term "conduct" found in §1962(c) of RICO should be interpreted by reference to *other* provisions of OCCA in which it was used by Congress and has been liberally interpreted by the courts:

> [The word "conduct"] is found in other statutes including, *inter alia*, 18 U.S.C. §1955 which makes it a crime for one to conduct an illegal gambling business. In *United States v. Tucker*, 638 F.2d 1292 (5th Cir. 1981), we held that a waitress serving drinks to customers engaged in gambling conducts an illegal gambling business within the intendment of 18 U.S.C. §1955. We concluded in *Tucker* that the word "conducts" simply means the performance

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[42] A number of civil RICO cases follow this standard in construing §1962(c). *See, e.g., Baggio v. EC Solar, Inc.*, No. 88 C 1893, 1990 U.S. Dist. LEXIS 5569, at *27 (N.D. Ill. May 8, 1990); *First Finan. Savs. Bank, Inc. v. American Bankers Ins. Co.*, 699 F. Supp. 1167, 1172-73 (E.D.N.C. 1988); *Odesser v. Continental Bank*, 676 F. Supp. 1305, 1312 & n.3 (E.D. Pa. 1987); *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 656 F. Supp. 49, 86 (S.D. Ohio 1986); *In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Securities Litig.*, 636 F. Supp. 1138, 1171 (C.D. Cal. 1986).

[43] 648 F.2d 367 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982), *on remand*, 681 F.2d 952 (5th Cir. 1982), *aff'd on other grounds sub nom., Russello v. United States*, 464 U.S. 16 (1983).

[44] 648 F.2d at 382.

[45] *Id.*

> of activities necessary or helpful to the operation of the enterprise.[46]

The approach adopted in *Martino* is surely the correct one because, as this Court recognized when interpreting the "pattern" element in *Northwestern Bell*, "we may take guidance from a provision elsewhere in [OCCA], of which RICO formed Title IX,"[47] and it interpreted the "pattern" element by reference to Title X of OCCA, the Dangerous Special Offender Sentencing Act.[48]

Section 1955 makes it a crime for one to "conduct" an illegal gambling business[49] and this Court has held that the

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[46] 648 F.2d at 382. *See also United States v. Manzella*, 782 F.2d 533, 538 (5th Cir.) (customers of arson service can conspire to violate §1962(c) by buying the service offered), *cert. denied*, 476 U.S. 1123 (1986).

[47] 492 U.S. at 239 (citation omitted).

[48] *Id.* at 237-39 (citing 18 U.S.C. §3575 *et seq.* (now partially repealed)). In *Sedima*, 473 U.S. at 496 n.14, this Court also interpreted the "pattern" element by reference to §3575(e), stating that "[t]his language may be useful in interpreting other sections of" RICO. *See also Iannelli v. United States*, 420 U.S. 770, 788-89 (1975) (utilizing §1511 — proscribing conspiracies to obstruct state law enforcement efforts — to interpret §1955 — proscribing gambling syndicates), *ovrl'd on other grounds by Brown v. Ohio*, 432 U.S. 161 (1977).

[49] The statute provides in pertinent part:

> Whoever *conducts*, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

18 U.S.C. §1955(a) (emphasis added). Section 1955 was enacted as Part C of Title VIII of OCCA and was aimed toward curtailing syndicated gambling. *United States v. Pinelli*, 890 F.2d 1461, 1470 & n.6 (10th Cir. 1989), *cert. denied*, 494 U.S. 1038 (1990). Congress' intent as to the precise meaning of "conduct" is neither defined by the statute nor explained in the legislative history of §1955; however, §§1511 and 1955 were enacted together as §§802 and 803 of OCCA and the same language is used in both statutes to define an "illegal gambling business." When referring to that statutory phrase in §1511, Congress stated:

> The statute applies generally to persons who participate in the ownership, management, or conduct of an illegal gambling business. The term "conduct" refers both to high level bosses (continued)

statute "proscribes *any* degree of participation in an illegal gambling business."[50] The Eighth Circuit expressly followed this Court's liberal interpretation of §1955's "conduct" element just five years ago in *United States v. Hammond*,[51] holding that a woman who knowingly permitted her telephone to be used in the operation of defendant's gambling enterprise in exchange for compensation and merely supplied the defendant with paper used to record bets "conducted" the gambling enterprise:

> [S]ection 1955 includes anyone who participates in a gambling business other than a customer or bettor. The scope of [§]1955 is quite broad, all levels of personnel involved in the operation of a gambling business, not just those on the management level, are to be considered in determining whether five or more persons conduct such business within the meaning of [§]1955.[52]

The Eighth Circuit's analysis of the term "conduct" in

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and street level employees.
1970 U.S. Code Cong. & Adm. News 4007, 4029 (1970); *see also United States v. Rieger*, 942 F.2d 230, 233-34 (3d Cir. 1991); *Pinelli*, 890 F.2d at 1470-71.

[50] *Sanabria v. United States*, 437 U.S. 54, 70 n.26 (1978) (emphasis added).

[51] 821 F.2d 473 (8th Cir.), *cert. denied*, 484 U.S. 986 (1987).

[52] 821 F.2d at 476 (citations omitted). Accordingly, the Eighth Circuit held that the trial court had properly instructed the jury as follows:

> The term "conduct" as it is used in connection with the gambling business means to perform any act, function or duty which is necessary to or helpful in the ordinary operation of the business. A person may be found to conduct a gambling business even though he is a mere servant or employee having no part in the management or control of the business and no share in the profits.

Id. at 476 n.5 (citing E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions*, §61.05 (1977)); *see also United States v. Grezo*, 566 F.2d 854, 860 (2d Cir. 1977) (quoting trial court's instruction as to the requisite elements of "conducting" a gambling business).

Hammond should have been followed when it interpreted the same word in this case.[53] Its failure to do so creates an extraordinary anomaly: waitresses who serve drinks to gamblers can be criminally convicted for the "conduct" of a gambling business under §1955(a) while auditors who knowingly issue "clean" audit opinions on an enterprise's fraudulent financial statements which are used to defraud thousands of innocent investors cannot be held civilly liable for the "conduct" of the enterprise's affairs under §1962(c). Surely this was not Congress' intent when it used the term "conduct" in OCCA!

Given this uniformly liberal interpretation of §1955, [54] a

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[53] *See Arthur Young*, 937 F.2d at 1324. The Eighth Circuit is quite familiar with the proper construction of the term "conduct" found in §1955, since it has affirmed a number of convictions obtained in cases involving non-management employees of gambling syndicates. *See, e.g., United States v. Reeder*, 614 F.2d 1179, 1182 n.2 (8th Cir. 1980) (the test of "conduct" is whether the activities performed were necessary "or helpful" to the operation of the gambling business); *United States v. Bennett*, 563 F.2d 879, 883 (8th Cir.) (same — services provided by waitresses were "necessary" or "helpful" because they "allowed the gamblers to remain at the table and continue placing bets"), *cert. denied*, 434 U.S. 924 (1977); *United States v. Meese*, 479 F.2d 41, 43 (8th Cir. 1973) ("We hold that all levels of personnel involved in operating an illegal gambling business and not merely the management level are to be included in determining whether five or more persons conduct such business within the meaning of §1955.") (citations omitted).

[54] *See, e.g., United States v. Zannino*, 895 F.2d 1, 10 (1st Cir.) (§1955 "applies even to individuals who have no role in managing or controlling the business and who do not share in its profits.") (citation omitted) *cert. denied*, 494 U.S. 1082 (1990); *United States v. Riccobene*, 709 F.2d 214, 230 (3d Cir.) ("The evidence shows that he was an employee of the game — taking bets from people — and thus he may be considered to have 'conducted' a gambling business as is required by [§]1955."), *cert. denied*, 464 U.S. 849 (1983); *United States v. Jenkins*, 649 F.2d 273, 275 (4th Cir. 1981) (same — layoff man); *United States v. Tucker*, 638 F.2d 1292, 1295 (5th Cir. 1981) (waitresses who served drinks to gamblers, made change for them to use in placing bets in cash game, and delivered telephone messages to them performed functions necessary to or helpful in operation of gambling business); *United States v. Avarello*, 592 F.2d 1339, 1349 (5th Cir.) ("It is well settled . . . that the scope of [§1955] includes all those who

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similar statute enacted as part of OCCA, the analysis utilized by the court below is even more untenable and should be flatly rejected.

D. REFERENCE TO THE SAVINGS AND LOAN CRISIS DEMONSTRATES HOW RESPONDENT'S PROFESSIONAL SERVICES HAVE BEEN "NECESSARY" OR "HELPFUL" TO THE OPERATION OF RICO ENTERPRISES WHICH HAVE DEFRAUDED THE GOVERNMENT AND THOUSANDS OF INNOCENT VICTIMS

Our nation is embroiled in a continuing (and, indeed, deepening) bank and savings and loan crisis which has literally caused this generation to mortgage its (and at least the next two generations') economic futures. Respondent's (and other accounting firms') responsibility for the crisis cannot be underestimated,[55] yet it and other members of the accounting and legal professions clearly envision this case as

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(fn. continued)
participate in the operation of an illegal gambling business, except customers or mere bettors, regardless of how minor their roles. Thus, persons who perform a necessary function in the operating of illegal gambling — whether they be labelled writers, agents, runners, watchmen, telephone clerks, collectors, or subbookmakers — 'conduct an illegal gambling business.' ") (citation omitted), *cert. denied*, 444 U.S. 844 (1979).

[55] In a recent decision enforcing a subpoena issued by the Office of Thrift Supervision (OTS), which sought to compel Respondent to turn over documents relating to its audit and accounting work on behalf of 23 troubled or failed thrift institutions, Judge Lamberth wrote that "[a]ccounting firms may have been responsible for many of the abuses which have led to this country's savings and loan crisis," noting that the OTS had advised the court that "approximately one-third of the 690 financial institutions that have failed were audited by Ernst & Young or its predecessor," Arthur Young. The losses caused by just four of the 23 institutions OTS is currently investigating — Lincoln Savings, Silverado Savings, Vernon Savings and Western Savings — have been estimated to total more than $5.5 *billion*, as the court noted. *Director of Office of Thrift Supervision v. Ernst & Young*, Misc. No. 91-401 (RCL), 1992 U.S. Dist. LEXIS 2315, at *19 (D.D.C. Mar. 3, 1992).

providing an opportunity to emasculate RICO and shield them from the ruinous (and well-deserved) potential liability they face for their undeniable roles in this crisis.[56]

One pending case which typifies Respondent's (and other professionals') liability for wrongdoing in connection with a failed thrift institution involves convicted felon Keating's ACC/Lincoln Savings. Three (of the so-called "Big Six") accounting firms — Respondent, Arthur Andersen & Co.[57]

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[56] In assessing the causes and impact of the bank and thrift crisis, careful attention must be paid to critical roles played by professionals — attorneys, accountants, loan brokers, investment bankers and real estate appraisers — who abandoned their professional ethics and willfully joined the "chain of greed" which epitomized the "thrifts' " operations and eventual downfall. One reporter explained that "crimes in thrifts . . . often required the cooperation of groups of people, in what might be called a 'chain of greed' ":

> [T]he chains involved five kinds of professionals, in addition to the borrowers who benefitted from the questionable loans. At the beginning of a transaction, *real estate brokers* masterminded the shady deals. Crooked *appraisers* then inflated real estate values to make the deals work. Inside the institutions, an array of *employees* from loan officers hungry for a loan commission to the executives themselves participated in the fraud. At the conclusion of a deal, *lawyers* "papered" the bogus transactions by drawing up the contracts, and *accountants* either looked the other way or neglected to scour the institutions' books too carefully.

Harris, *The S&L Looters Who May Get Away*, Wall St. J., Feb. 12, 1990, at A12, col. 3 (emphasis in original); *see also* France, *Savings & Loan Lawyers*, 77 A.B.A.J. 52 (May 1991) (observing that critical roles were often played by attorneys who aided and abetted thrift institutions' criminal wrongdoing).

[57] Arthur Andersen received $3.7 million for providing clean audit opinions to ACC/Lincoln Savings in 1984 and 1985. According to thrift regulators, it fraudulently backdated loan file data and "stuffed" files with loan documentation. *See* Thomas, *Regulators Cite Delays and Phone Bugs in Examination, Seizure of Lincoln S&L*, Wall St. J., Oct. 27, 1989, at A4, col. 2; J. Granelli, *Keating Trial Focuses on Advisers*, L.A. Times, Mar. 14, 1992, at D1, col. 3. Although it steadfastly denied wrongdoing, following plaintiffs' opening statement in the pending RICO class action trial it agreed to pay $30 million to settle claims asserted by stockholders and bondholders. D. Jefferson & L. Berton, *Accounting Firm to Settle Suit on Thrift*, Wall St. J., Mar. 17, 1992, at A4, col. 1.

and Touche Ross & Co. — are implicated in the $2.5 *billion* collapse of Keating's feudal kingdom, while several so-called "national" law firms have also been charged with wrongdoing in the scandal.[58] Reduced to its essentials, investors allege that Respondent received $7 million in fees to provide the ACC/Lincoln Savings RICO enterprise with "clean" audit opinions for 1986 and 1987 which permitted the sale of over $200 million of junk bonds to thousands of elderly investors specifically targeted by Keating and his co-conspirators as "the weak, meek and ignorant."[59] In addition, during 1987 and 1988 Respondent's lead partner on the ACC/Lincoln audits, Jack Atchison, wrote advocacy letters to numerous U.S. Senators, met with at least one of them in a successful effort to convince several Senators ("the Keating Five") to intervene on Keating's behalf with federal regulators and misrepresented Lincoln's collapsing financial condition to regulators. The resulting two-year delay before regulators could seize Lincoln Savings will cost the taxpayers at least an additional $1 *billion*.[60] Immediately after

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[58] ACC/Lincoln Savings' outside counsel, New York's Kaye, Scholer, Fierman, Hays & Handler, which was accused of aiding and abetting a fraudulent scheme to mislead investors by assisting in the preparation of a misleading initial securities prospectus, characterized ACC/Lincoln Savings investors' claims as "frivolous" and "ridiculous" when they were initially filed in 1989. *See S&L Scandal Snares a Big Firm*, Nat'l L. J., May 29, 1989, at 3. Just one year later, however, Kaye Scholer paid $20 million to settle those same claims. *Law Firm in Lincoln S&L Suit Agrees to Pay $20 Million*, S.F. Chron., June 16, 1990, at A1; *see also* Note, *Securities Attorneys Face Liability For Wrongs of Their Corporate Clients*, 5 J. of Legal Comment. 403, 406-08 (1990) (detailing Kaye Scholer's involvement in Keating's multi-faceted fraudulent schemes).

[59] *See* Nash, *Auditors of Lincoln on the Spot*, N.Y. Times, Nov. 14, 1989, at D1, col. 3. Although federal and state examiners had issued examination reports stating that Lincoln was insolvent, Respondent did not mention in its audit opinions Lincoln's potential problems. *Id.*

[60] *See* Jackson, *New Disclosures of Riegle's Lincoln Role Suggest He Was More Than a Bystander*, Wall St. J., Nov. 15, 1989, at A28, col. 1; Jackson, *FBI Probe Focuses on Senators' Ties to Keating's S&L*, Wall St. J., Nov. 13, 1989, at A7B, col. 2; *The Senate Five*, N.Y. Times, Oct. 23, 1989, at

(continued)

Respondent issued the year-end 1987 clean audit opinion for ACC/Lincoln, Atchison resigned from the accounting firm and accepted a job from Keating at a four-fold increase in his annual compensation.[61] In essence, as the Lincoln Savings example illustrates, Respondent (and other accountants) ignored the importance of the audit function as well as their roles as public watchdogs[62] when they prostituted

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A18, col. 1; Stanton, *House Orders Subpoenas in Keating Case*, Ariz. Republic, Oct. 13, 1989, at A1, col. 1; Kammer & Hall, *Lincoln's "Kamikaze Banking": Wallflower Thrift Became High Roller*, Ariz. Republic, Sept. 16, 1989, at A2, col. 1.

61 *See* Blakey, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform*, 43 Vand. L. Rev. 851, 888-91 & nn.108-10 (1990) (detailing Respondent's involvement in the Lincoln Savings debacle). Judge Stanley Sporkin, who tried one aspect of the litigation relating to the catastrophic failure of Lincoln Savings, highlighted in pointed language the role played by professionals who instigated and/or aided and abetted the fraudulent operation of now-failed thrift institutions. Referring to Atchison, who resisted discovery in the investors' class action suit by invoking the privilege against self-incrimination, Judge Sporkin asked, "Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?" *Lincoln Savs. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990).

62 As *ACC/Lincoln* illustrates, Respondent and other accounting firms have persistently ignored this Court's explicit statement of the accounting profession's "public watchdog" role:

> By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.

(continued)

themselves for errant thrift operators.[63]

There can be no doubt that Respondent's (and other professionals') activities were "necessary" or "helpful" in the conduct of the ACC/Lincoln Savings enterprise's affairs, yet the Eighth Circuit's analysis of the "conduct" element in the

(fn. continued)
United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984) (emphasis in original). In language which can only be regarded as prescient of Respondent's (and Atchison's) role in the ACC/Lincoln Savings scandal, this Court also stated that "[i]f investors were to view the auditor as an *advocate* for a corporate client, the value of the audit function itself might well be lost." *Id.* at 820 n.15 (emphasis added) (citing A. Arens & J. Loebbecke, *Auditing: An Integrated Approach* 55-58 (1976)).

63 Running through the ongoing savings and loan crisis is the general problem of fraudulent financial reporting. When such aberrant behavior occurs, widespread consequences result, sometimes causing a devastating ripple effect. *See Report of the National Commission on Fraudulent Financial Reporting* 4 (1987). The General Accounting Office has been sharply critical of the accounting profession — most notably, Respondent — for its utter failure to uncover the widespread fraud in these failing financial institutions:

> We concluded that for 6 of the 11 S&Ls, CPA's did not adequately audit and/or report the S&Ls' financial or internal control problems in accordance with professional standards. The CPAs' problems involved (1) inadequate audit work in evaluating loan collectibility and (2) inadequate reporting on S&Ls' accounting practices, regulatory compliance, and internal controls. The nature of the audit and reporting problems was significant enough to warrant our referring the CPA firms performing the audits to regulatory and professional bodies for their review.
>
> The latest audit reports for the 11 S&Ls before they failed showed combined positive net worth totaling approximately $44 million. At the time of the S&Ls' failures, which ranged from 5 to 17 months after the date of the last audit reports, the 11 S&Ls had combined negative net worth totaling approximately $1.5 billion.

General Accounting Office, *CPA Audit Quality: Failures of CPA Audits to Identify and Report Significant Savings and Loan Problems* 1 (1989); *see also* Wayne, *Where Were the Accountants?*, N.Y. Times, Mar. 12, 1989, §3, at 1, col. 2 (detailing accounting firms' potential liability in thrift crisis).

instant case suggests that it would find that Respondent did not "participat[e] in the operation or management" of the enterprise and improperly absolve it of RICO liability.[64] Under the standard adopted in other circuits in criminal and civil RICO cases, Respondent's activities would surely subject it to liability under §1962(c) in fraudulent schemes similar to that involved in *ACC/Lincoln Savings*, yet the Eighth Circuit would invariably shield such culpable involvement in directly or indirectly conducting an enterprise's affairs from civil or criminal liability. Given its developing record of pervasive wrongdoing which has already led to multi-*billion* dollar costs to the American taxpayer, Respondent's effort in this case to render RICO useless as a prosecutorial tool utilized by Government agencies such as the OTS, Resolution Trust Corporation and Federal Deposit Insurance Corporation, as well as defrauded investors, entities and consumers should be resisted.

CONCLUSION

NASCAT respectfully urges this Court to reverse the decision of the court below and to adopt the standard of liability under §1962(c) stated by the Eleventh Circuit in *Bank of America* and recognized by the courts uniformly construing §1955(a), which will reaffirm RICO's noble purpose to combat organized crime and fraud which Congress charted a generation ago.

DATED: April 9, 1992

Respectfully submitted,

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64 *Arthur Young*, 937 F.2d at 1324.